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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, PETITIONER,

vs.

PHILIP YOUNG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 3, 1955

CERTIORARI GRANTED, NOVEMBER 21, 1955

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United States Court of Appeals

For the District of Columbia Circuit

No. 12,526

KENDRICK M. COLE,

Appellant,

v.

PHILIP YOUNG, ET AL.,

Appellees

Appeal From the United States District Court for the District of Columbia

---

JOINT APPENDIX

(Filed September 10, 1954.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

KENDRICK M. COLE, 114 Brooklyn Ave., Freeport, Long Island,

Plaintiff,

against

PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, members of the United States Civil Service Commission, Washington 25, D. C., and OVETA CULP HOBBY, Secretary, Department of Health, Education and Welfare, Washington 25, D. C.,

Defendants.

Amended Complaint for Declaratory Judgment

Plaintiff, by his attorney, James H. Heller, alleges as follows:

First: That this is an action for a declaratory judgment and other equitable relief, to restore plaintiff to employment in the Food & Drug Administration of the Department of Health, Education & Welfare, which arises under the Constitution and Laws of the United States, and involves a matter in controversy, exceeding the sum or value of $3,000.00, exclusive of interest and costs.

Second: That the jurisdiction of this Court arises under and by virtue of Sections 1331, 2201 and 2202 of Title 28 of the United States Code, as amended.

Third: That plaintiff is a citizen of the United States and a resident of the State of New York, and brings this action in his own right.

Fourth: That plaintiff is an honorably discharged veteran of the United States Army, and was classified as a five point veteran's preference eligible under and pursuant to Section 14 of the Veterans' Preference Act of 1944, Section 863 of Title 5, United States Code.

Fifth: That prior to the 13th day of November, 1953, plaintiff held a position in the classified Civil Service as a Food & Drug Inspector with the Food & Drug Administration, Department of Health, Education & Welfare, New York District, New York, New York, at an annual salary of $4,955.

Sixth: On or about the 20th day of October, 1953, plaintiff received a request to come to Washington, D. C., from the Chief of Personnal Security, Department of Health, Education & Welfare, in connection with an investigation regarding plaintiff's retention in employment, pursuant to the provisions of Executive Order 10450 (April 29, 1953, 18 F. R. 2489).

Seventh: During said investigation, plaintiff was asked numerous questions concerning his attitudes, associations and friends. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 1, is a memorandum concerning plaintiff's investigation by the Chief of Personnel Security, Department of Health, Education & Welfare, and his assistant).

Eighth: Thereafter, and on the 13th day of November, 1953, plaintiff received a Notice of Suspension "pending investigation under Executive Order 10450". (Annexed

hereto and made a part hereof, as plaintiff's Exhibit 2, is a photostatic copy of a Notice of Personnel Action, dated November 13, 1953, suspending plaintiff from his employment).

Ninth: Thereafter, and on or about the 25th day of November, 1953, plaintiff received a written statement of charges that:

"1. That you established and have continued a close association with individuals reliably reported to be Communists.

2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.

3. That you have, by your own admission, donated funds to the Nature Friends of America.

4. That you have contributed your services in the form of work to the Nature Friends of America.

5. That you have attended social gatherings of the Nature Friends of America."

(Annexed hereto and made a part hereof, as plaintiff's Exhibit 3, is a photostatic copy of a written statement of charges, dated November 25, 1953.)

Tenth: Thereafter, and on or about the 23rd day of December, 1953, plaintiff declined to answer the charges and urged that the action of the Secretary, Department of Health, Education and Welfare, was a violation of plaintiff's right of "fredoom of association". (Annexed hereto and made a part hereof, as plaintiff's Exhibit 4, is a

copy of a letter dated December 23, 1953, from plaintiff to the Assistant to the General Counsel of the Department of Health, Education & Welfare).

Eleventh: Thereafter, and on or about the 4th day of January, 1954, plaintiff was notified that his case had been forwarded to the Secretary, Department of Health, Education & Welfare, for final disposition, inasmuch as it appeared that plaintiff did not desire a "hearing". (Annexed hereto and made a part hereof, as plaintiff's Exhibit 5, is a photostatic copy of a letter dated January 4, 1954, from the Assistant to the General Counsel, Department of Health, Education & Welfare, to plaintiff).

Twelfth: Thereafter, and on or about the 15th day of January, 1954, plaintiff was notified that his termination from employment was ordered, effective January 20, 1954, in that his continued employment was not "clearly consistent with the interests of national security", which notice, however, did not inform plaintiff of his right to appeal to the United States Civil Service Commission. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 6, is a photostatic copy of a Notice of Adverse Determination, ordering plaintiff's termination from his employment effective January 20, 1954.)

Thirteenth: Thereafter, and on or about the 27th day of January, 1954, plaintiff's counsel requested reconsideration of the adverse determination of defendant, Secretary, Department of Health, Education & Welfare, and requested a re-opening of plaintiff's case by said defendant, on the ground that plaintiff's physical and emotional condition at the time he refused to answer the statement of "Charges", heretofore annexed as plaintiff's Exhibit 3, precluded plaintiff from intelligently exercising his rights,

in that he was then in the midst of a "post-operational depression" and, if plaintiff was permitted to re-open his case, he would prove that he was "a conscientious and loyal employee, whose retention in government employment is totally consistent with the interests of national security." (Annexed hereto and made a part hereof, as plaintiff's Exhibit 7, is a photostatic copy of plaintiff's request for re-opening of plaintiff's case; annexed hereto and made a part hereof, as plaintiff's Exhibit 8, is plaintiff's supporting affidavit in support of the request for a re-opening of his case, sworn to January 26, 1954; annexed hereto and made a part hereof, as plaintiff's Exhibit 9, is a photostatic copy of plaintiff's physician's supporting affidavit in support of plaintiff's request for a re-opening of his case, sworn to January 27, 1954.)

Fourteenth: Thereafter, and on or about the 29th day of January, 1954, plaintiff's counsel informed the Department of Health, Education & Welfare that if plaintiff was permitted to answer the derogatory information contained in said Statement of Charges, heretofore annexed as plaintiff's Exhibit 3, and have a "hearing", plaintiff would prove that:

1. he did not knowingly establish or maintain any close or sympathetic association with any member of the Communist Party.

2. he did not maintain a sympathetic association with the Nature Friends of America, except in connection with his hobby, hiking and camping, and in this connection he only used a cabin operated by this organization as a guest of an individual in possession of a key to this cabin. Moreover, he specifically refused to become a member of said organization.

3. he donated no work to the Nature Friends of America, except to mark or blaze trails in the woods in connection with his hobby of hiking and camping.

(Annexed hereto and made a part hereof, as plaintiff's Exhibit 10, is a copy of a letter from plaintiff's counsel to the Assistant to the General Counsel, Department of Health, Education & Welfare, dated January 29, 1954.)

Fifteenth: Thereafter, and on or about the 4th day of February, 1954, plaintiff was notified that his request for a hearing was denied, which Notice of Adverse Determination did not advise plaintiff of his right to appeal to the United States Civil Service Commission. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 11, is a photostatic copy of a letter from defendant, Secretary, Department of Health, Education & Welfare, to plaintiff's counsel, dated the 4th day of February, 1954.)

Sixteenth: Thereafter, and on or about the 10th day of February, 1954, plaintiff requested defendant, Secretary, Department of Health, Education & Welfare, to re-consider her original action and her action of February 4, 1954, denying plaintiff the right to a hearing, by reason of the fact that:

"(1) the charges contained in the letter of November 25, 1953 were insufficient on their face and not in compliance with Section 14 of the Veterans' Preference Act (5 U. S. C. Sec. 863) or the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1 et seq.);

"(2) that Executive Order 10450, as it applies to the Department of Health, Education and Welfare, is unconstitutional, and in violation of the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, et seq.);

"(3) that the Act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-3) is unconstitutional insofar as it purports to grant an unlawful exercise of the legislative power to the executive."

(Annexed hereto and made a part hereof, as plaintiff's Exhibit 12, is a photostatic copy of a letter from plaintiff's counsel to defendant, Secretary, Department of Health, Education & Welfare, dated February 10, 1954.)

Seventeenth: Thereafter, and on or about the 24th day of February, 1954, plaintiff was notified that his request for re-consideration of the decision of defendant, Secretary, Department of Health, Education & Welfare, was denied; which Notice of Adverse Determination did not advise plaintiff of his right to appeal to the United States Civil Service Commission. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 13, is a photostatic copy of a letter from defendant, Secretary, Department of Health, Education & Welfare, to plaintiff's counsel, dated February 24, 1954.)

Eighteenth: Thereafter, and on or about the 25th day of February, 1954, plaintiff appealed to the Second United States Civil Service Region, United States Civil Service Commission, claiming that his discharge was in violation of Section 14 of the Veterans' Preference Act (Section 863 of Title 5, United States Code) and the Rules and Regulations of the Civil Service Commission, in that (1) he was not furnished with all of the reasons for his discharge; (2) that said discharge was arbitrary, capricious and discriminatory and not made in good faith; (3) that no notice of any adverse determination ever advised him of his right to appeal to the United States Civil Service Commission; (4) that the refusal to grant him a "hearing" pursuant to the request of January 27, 1954, was arbi-

trary, capricious and discriminatory and not made in good faith; (5) that the refusal to reconsider the denial of the request for the "hearing" pursuant to the request of February 10, 1954, was arbitrary, capricious and discriminatory and not made in good faith.

Nineteenth: Thereafter, and on or about the 3rd day of March, 1954, plaintiff was advised by the Regional Director, Second United States Civil Service Region, United States Civil Service Commission, that his appeal was denied, inasmuch as the Commission was without jurisdiction to hear appeals of employees suspended or terminated pursuant to Executive Order 10450. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 14, is a photostatic copy of the letter from the Regional Director, Second United States Civil Service Region, to plaintiff's counsel, dated March 3, 1954, denying plaintiff's right to appeal.)

Twentieth: Thereafter, and on or about the 4th day of March, 1954, plaintiff appealed directly to the Commissioners, United States Civil Service Commission, pursuant to permission granted plaintiff by the Regional Director, Second United States Civil Service Region, on March 3, 1954.

Twenty-first: Thereafter, and on or about the 5th day of May, 1954, the United States Civil Service Commission affirmed the decision of the Regional Director, Second United States Civil Service Region, on the ground that plaintiff's appeal was not within the purview of Section 14 of the Veterans' Preference Act of 1944. (Annexed hereto and made a part hereof, as plaintiff's Exhibit 14, is a photostatic copy of a letter from John E. Blann, Chairman of the Board of Appeals and Review, United States Civil Service Commission, dated May 5, 1954, to plaintiff's counsel.)

Twenty-second: That plaintiff has rendered full and complete satisfactory service in his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare.

Twenty-third: That plaintiff in his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York, had no access to any secrets of the Government of the United States, or "classified" material, and was not in any position to influence policy against the interests of the Government of the United States, or otherwise aid or assist the enemies of the Government of the United States.

Twenty-fourth: That the action of defendant, Secretary, Department of Health, Education and Welfare, in determining that plaintiff's continued retention in employment was not clearly consistent with the interests of national security, and discharging plaintiff from his employment on or about the 15th day of January, 1954, was arbitrary, capricious, discriminatory and not made in good faith, and was taken in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States.

Twenty-fifth: That the atcion of defendant, Secretary, Department of Health, Education and Welfare, in discharging plaintiff from his employment on or about the 15th day of January, 1954, as aforesaid, was in violation of Section 14 of the Veterans' Preference Act of 1944, Section 863 of Title 5, United States Code, and the Rules and Regulations of the United States Civil Service Commission, in that plaintiff was not furnished with all of the reasons for his discharge; that no notice of any adverse determniation ever advised him of his right to appeal to the United States Civil Service Commission; that plaintiff

was never furnished with a written decision notifying him of the reasons for his discharge.

Twenty-sixth: That the action of defendant, Secretary, Department of Health, Education and Welfare, in discharging plaintiff from his employment on or about the 15th day of January, 1954, as aforesaid, was in violation of the Act of August 26, 1950, 64 Stat. 476 (Section 22-1 of Title 5, United States Code, et seq.), in that plaintiff was not furnished with all of the reasons for his discharge and was never furnished with a written decision notifying him of the reasons for his discharge.

Twenty-seventh: That the action of defendants, Members of the United States Civil Service Commission, in denying the appeal of plaintiff to the United States Civil Service Commission, pursuant to Section 14 of the Veterans' Preference Act of 1944 (Section 863 of Title 5, United States Code), was unlawful, improper and in violation of said Section of said Law.

Twenty-eighth: That defendants, Members of the United States Civil Service Commission and defendant Secretary of the Department of Health, Education and Welfare, have refused and continue to refuse to reinstate and restore plaintiff to his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York.

Twenty-ninth: That there exists between plaintiff and defendants herein, an actual controversy, and plaintiff has instituted this action for the purpose, among others, of having the aforesaid actions of defendants, in terminating plaintiff from his employment as a Food and Drug Inspector with the Food & Drug Administration, Department of

Health, Education and Welfare, New York District, New York, declared null and void and in violation of the provisions of Section 14 of the Veterans' Preference Act of 1944 (Section 863 of Title 5, United States Code); in violation of the Act of August 26, 1950, 64 Stat. 476 (Section 22-1 of Title 5, United States Code); and further, in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States.

Thirtieth: That plaintiff has exhausted all of the remedies available to him under applicable administrative procedures and has no adequate remedy at law, other than the instant action, under the jurisdiction conferred by this Court.

Thirty-first: By reason of the premises, plaintiff is entitled to relief against defendants under the Federal Declaratory Judgment Act of June 14, 1934, Title 28 of the United States Code, Sections 2201 and 2202.

Thirty-second: That no prior application for this or any other relief has been made to this or any other Court.

WHEREFORE, plaintiff prays or the following relief:

1. That the actions of defendant, Secretary, Department of Health, Education and Welfare, in determining that plaintiff's continued retention in employment as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, is not clearly consistent with the national security, and discharging him from his employment on or about the 15th day of January, 1954, be declared to be null and void and illegal and in violation of the First, Fifth and Sixth Amendments to the United States Constitution, in violation of Section 14 of the Veterans' Preference Act of 1944,

(Section 863 of Title 5, United States Code), and in violation of the Act of August 26, 1950, 64 Stat. 476, (Section 22-1 of Title 5, United States Code);

2. That the action of defendants, Members of the United States Civil Service Commission, in refusing to hear the appeal of plaintiff from the adverse determinations of defendant, Secretary, Department of Health, Education and Welfare, be declared null and void and illegal and in violation of the Veterans' Preference Act of 1944, (Section 863 of Title 5, United States Code);

3. That plaintiff be ordered reinstated and restored to his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York, as of the date of his discharge; and

4. For such other and further relief as to this Court may seem just and proper in the premises.

JAMES H. HELLER,
Attorney for Plaintiff,
1026 Woodward Building,
Washington, D. C.

Exhibit 2, Annexed to Amended Complaint

NOTICE OF PERSONNEL ACTION, DATED NOVEMBER 13, 1953.

(OFFSET)

(See opposite ☛)

STANDARD FORM 50 (7 PART)
REV. APRIL 1951
PROMULGATED BY
U. S. CIVIL SERVICE COMMISSION
CHAPTER 21, FEDERAL PERSONNEL MANUAL

(1)

DEPARTMENT OF HEALTH EDUCATION AND WELFARE
[redacted]
Food and Drug Administration

NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR.—MISS—MRS.—ONE GIVEN NAME, INITIAL(S), AND SURNAME)	2. DATE OF BIRTH	3. JOURNAL OR ACTION NO.	4. DATE
Mr. Kendrick M. Cole	5-3-13	1	11-13-53

This is to notify you of the following action affecting your employment:

5. NATURE OF ACTION (USE STANDARD TERMINOLOGY)	6. EFFECTIVE DATE	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
Suspension	COB 11-13-53	

FROM		TO
Food and Drug Inspector	8. POSITION TITLE	
GS-1861-7-1050 $4955 per annum	9. SERVICE, SERIES, GRADE, SALARY	
New York District	10. ORGANIZATIONAL DESIGNATIONS	
New York, N. Y.	11. HEADQUARTERS	
[X] FIELD [ ] DEPARTMENTAL	12. FIELD OR DEPT'L	[ ] FIELD [ ] DEPARTMENTAL

13. VETERAN'S PREFERENCE					14. POSITION CLASSIFICATION ACTION			
NONE	WWII	OTHER	5-PT.	10-POINT DISAB.	NEW	VICE	I.A.	REAL.

Exhibit 3, Annexed to Amended Complaint

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

WASHINGTON

Nov. 25, 1953

REGISTERED MAIL

Dear Mr. Cole:

Pursuant to the authority contained in Executive Order 10450, and in accordance with the Security Regulations of this Department, a full field investigation has been conducted concerning you. Your case has been reviewed by the Director of Security, who has recommended, in accordance with the Executive Order and regulations of the Department, that you be suspended. This recommendation was approved by the Secretary on November 10, 1953.

The regulations further provide that the Under Secretary shall notify the suspended employee as soon as possible of the reasons for his suspension and that any employee who is a citizen of the United States, and who has a permanent or indefinite appointment, and who has completed his probationary or trial period shall receive a written statement of charges. This letter is, therefore, written to you in accordance with Section 5(d) and (g)(1) of the foregoing regulations of the Department.

Investigation has disclosed the following information:

1. That you established and have continued a close association with individuals reliably reported to be Communists.

2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.

Exhibit 3, Annexed to Amended Complaint

3. That you have, by your own admission, donated funds to the Nature Friends of America.

4. That you have contributed your services in the form of work to the Nature Friends of America.

5. That you have attended social gatherings of the Nature Friends of America.

Concerning the above charges, your attention is directed to Executive Order 10450, Section 8(a) which states "The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in the Federal service of the person being investigated is clearly consistent with the interests of the national security."

The above charges are based on investigative data developed which specifically refers to Section 8(a), subdivisions (3) and (5) of the Executive Order. For your information, the particular subdivisions referred to are set forth as follows:

"*Section 8(a)(3)*: Establishing or continuing a sympathetic association with * * * any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means."

"*Section 8(a)(5)*: Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter

the form of government of the United States by unconstitutional means."

The above quoted subdivisions of Executive Order 10450 have been incorporated in the security regulations of this Department under Section 3(b), subdivisions (3) and (5).

You have the right to submit within thirty days after notification of your suspension or within thirty days after issuance of this statement of charges, statements and/or affidavits, refuting or explaining the charges which were the basis of your suspension, to the Assistant to the General Counsel, Room 5450, HEW Building. Since you have a permanent appointment and have completed your probationary period, you are also entitled to a hearing if you so request. Such request for a hearing should be made within thirty days from receipt of this letter.

A copy of Executive Order 10450 and the regulations of the Department are enclosed.

Very truly yours,

NELSON A. ROCKEFELLER
Under Secretary

MR. KENDRICK MCDOWELL COLE
% Mrs. Mary B. Cole
1189 Great Plain Avenue
Needham, Massachusetts
Enclosure

Exhibit 4, Annexed to Amended Complaint

COPY

December 23, 1953

Assistant to the General Counsel
Room 5450 HEW Building
Washington, D.C.

Dear Sir:

I am writing this letter in response to a list of charges which were made against me under Executive Order 10450 in a letter dated November 25, 1953.

In the charges made against me I am not accused of committing any overt acts against the government of the United States, or of entering into any conspiracy against this Government, or of doing or saying anything which would indicate that I am disloyal to the Government of this country.

These charges concern themselves with my associations which I carry on as part of my private informal social life. I consider any request by the United States Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basis inherent right of "freedom of association."

I hereby, therefore, do refuse to make any explanation regarding the associations carried on in my private life and so long as I am a citizen of a democratic country and not a totalitarian state I shall continue to associate with any persons or groups of persons whom I see fit to choose.

I am writing this letter rather belatedly as I have just been released from the hospital after an operation for a diverticulum of the esophagus.

Respectfully,

KENDRICK M. COLE

Exhibit 5, Annexed to Amended Complaint

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE

WASHINGTON

Zone 25

January 4, 1954

Mr. Kendrick M. Cole:
319 West 103rd Street,
New York, New York

Dear Mr. Cole:

Receipt is acknowledged of your letter of December 23, 1953, regarding your proposed removal from employment with this Department pursuant to the provisions of Executive Order 10450.

From your letter it appears that you do not desire a hearing on this matter. Accordingly, the case has been forwarded to the Secretary for final disposition and you will be advised of the determination which is made.

Very truly yours,

HAROLD B. SIEGEL,
Assistant to the General Counsel.

Exhibit 6, Annexed to Amended Complaint

DEPARTMENT OF

HEALTH, EDUCATION, AND WELFARE

WASHINGTON

Jan 15, 1953

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Dear Mr. Cole:

Reference is made to a letter from the Under Secretary dated November 25, 1953, in which you were furnished a statement of charges based on data developed under Section 8(a), subdivision (3) and (5) of Executive Order 10450.

In your reply of December 23, 1953 to the Assistant to the General Counsel you advise that you refuse to make any explanations regarding the associations carried on in your private life and that you will continue to associate with any persons or groups of persons whom you see fit to choose.

Based on a study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954.

Very truly yours,

OVETA CULP HOBBY
Secretary

Mr. Kendrick McDowell Cole
319 West 103rd Street
New York, New York

Exhibit 7, Annexed to Amended Complaint

January 27, 1954

Mrs. Oveta Culp Hobby
Department of Health, Education and Welfare
Washington 25, D.C.

Re: *Kendrick McDowell Cole*

Dear Mrs. Hobby:

The above designated employee holds a permanent appointment with veteran's preference, as Food and Drug Inspector for the Food and Drug Administration.

On November 13, 1953, he received a notification of suspension pending investigation under E.P. 10450. On or about November 28, 1953, he received a set of interrogatories relating to his personal security.

He was at this time preparing to undergo an operation of an extremely serious nature, and was in no position to deal with the subject matter of the interrogatories.

Immediately following his release from the hospital and during the period of post-operational depression, he wrote a letter to the Assistant to the General Counsel in which he refused to make any answer to the interrogatories which had been submitted to him.

He has now fully recuperated and is aware of the fact that this rash act made in a time of extreme emotional depression has undoubtedly affected the course of his entire life.

He consulted this law firm and after intensive interrogation, we believe that if he is given an opportunity to fully present the facts of his case, there is no doubt that he would be completely cleared of the charges brought against him and that his retention in Federal employment would be to the benefit of the Government of the United States.

We therefore informed him that we would attempt to seek a reopening of his case and an opportunity to make written reply to the interrogatories and to be accorded the type of hearing which is customary under these circumstances.

We therefore appeal to your discretion and request that in the interests of justice and equity Mr. Cole be given an opportunity to clear his name.

We base this request on his physical and emotional condition at the time of receipt of the interrogatories and of his response to them. In support of this request, we enclose the sworn affidavits of both Mr. Cole and his personal physician.

Respectfully,

DICKSTEIN & SHAPIRO

By David I. Shapiro

DIS:DS

CC: Harold B. Siegel
Assistant to the General Counsel
Department of Health, Education
and Welfare
Washington 25, D.C.

Exhibit 8, Annexed to Amended Complaint

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

KENDRICK MCDOWELL COLE, being duly sworn, deposes and says:

I am a Food and Drug Inspector for the Food and Drug Administration, presently under suspension, and submit this affidavit in support of my request for a reopening of the security determination made with regard to my case, and my further request for permission to submit a written answer to the interrogatories dated November 25th, 1953 and for a hearing with regard to the matters raised therein.

At the time of my receipt of the interrogatories referred to above, I was under the care of Dr. Dwight Harken of Boston, Massachusetts.

I had been previously advised that it might be necessary to have an operation performed upon my esophagus.

On or about November 30th, 1953, I was examined at the Peter Bent Brigham Hospital in Boston and immediately following the examination, was informed that an operation for a diverticulum of the esophagus would be absolutely necessary. I was also advised that this operation was a major operation of an extremely delicate nature and required the services of a surgeon who specialized in operations of this type.

Needless to say, during this period of time, I was so overwhelmingly concerned with the state of my health that I had no opportunity to formulate an answer to the interrogatories which I had received.

I entered Peter Bent Brigham Hospital on December 6th, 1953, and after a period of five days of preparation, the operation was performed. I was released from the

hospital on December 20th, 1953, but continued under Dr. Harken's care for an additional period of ten days.

During this period of time, I was in a state of deep depression and emotional involvement, concerning not only the results of the operation and my general state of health but the money worries which came from the necessity of meeting hospital and doctor bills. I was in the depths of despair and it was out of this despair that I wrote my letter of December 23rd, 1953. I was emotionally in no position to make any determination as to a proper course of action and I sincerely regret what can only be characterized as an impetuous act borne of an abnormal state of mind.

Now that I have once more attained a state of emotional balance, I feel that I can clearly establish not only that I am not a security risk but even more, that I can affirmatively establish that I am a loyal and devoted American.

I seek an opportunity to avail myself of the procedures which are normally accorded in matters of this sort and specifically request that, in view of my physical and emotional condition at the time of the receipt of the interrogatories, I be given an opportunity to clear my name.

KENDRICK MCDOWELL COLE

Sworn to before me this
26th day of January, 1954.

DAVID ISRAEL SHAPIRO

Exhibit 9, Annexed to Amended Complaint

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. MARSHALL HOAG, being duly sworn, deposes and says:

That Mr. Kendrick McDowell Cole was under my care prior to his operation for a esophageal diverticulum.

I have seen him professionally three times since his return to New York, about December 31, 1953.

Mr. Cole has been nervous and appeared somewhat worried during this period.

J. MARSHALL HOAG D.O.

Sworn to before me this
27th day of January, 1954.

DAVID ISRAEL SHAPIRO

Exhibit 10, Annexed to Amended Complaint

COPY

Janury 29, 1954

Harold B. Siegel, Esq.
Assistant to the General Counsel
Department of Health, Education & Welfare
Washington 25, D. C.

Re: Kendrick M. Cole

Dear Mr. Siegel:

Pursuant to your telephone conversation with Mr. Heller today, I would like to inform you that if we are permitted to answer the derogatory information and have a hearing in this matter we will prove that:

1. Mr. Cole did not knowingly establish or maintain any close or sympathetic association with any member of the Communist Party.

2. Mr. Cole did not maintain a sympathetic association with the Nature Friends of America, except in connection with his hobby, hiking and camping, and in this connection he only used a cabin operated by this organization as a guest of an individual in possession of a key to this cabin. Moreover, he specifically refused to become a member of said organization.

3. Mr. Cole donated no work to the Nature Friends of America, except to mark or blaze trails in the woods in connection with his hobby of hiking and camping.

Moreover, we intend to prove that Mr. Cole is a conscientious and loyal employee whose retention in government employment is totally consistent with the interests of national security.

Very truly yours,

DICKSTEIN & SHAPIRO
By: DAVID I. SHAPIRO

DIS:DS

13. VETERAN'S PREFERENCE					
NONE	WWII	OTHER	5-PT.	10-POINT DISAB.	10-POINT OTHER
	X		X		

14. POSITION CLASSIFICATION ACTION			
NEW	VICE	I. A.	REAL.

15. SEX	16. RACE	17. APPROPRIATION	18. SUBJECT TO C. S. RETIREMENT ACT (YES—NO)	19. DATE OF APPOINTMENT AFFIDAVITS (ACCESSIONS ONLY)	20. LEGAL RESIDENCE
M		FROM: TO:	Yes		☐ CLAIMED ☐ PROVED STATE:

21. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements.

Pending investigation under E.O. 10450

ENTRANCE PERFORMANCE RATING:

R. Davila

R. Davila
Personnel Officer

22. SIGNATURE OR OTHER AUTHENTICATION

☆ U. S. GOVERNMENT PRINTING OFFICE : 961864

1. EMPLOYEE COPY

Exhibit 11, Annexed to Amended Complaint

Department of

HEALTH, EDUCATION AND WELFARE

Feb 4 1954

Dear Mr. Shapiro:

This is in reference to your letter of January 27, 1954, as implemented by your letter of January 29, 1954, to the Assistant to the General Counsel, requesting that Kendrick M. Cole be afforded a hearing pursuant to the provisions of Executive Order 10450 and the Security regulations of this Department.

As you know, Mr. Cole failed to exercise his right to apply for a hearing and his separation was directed. I have reviewed the information which you have forwarded in support of your request, as well as other available information. On the basis of the record, the reopening of this case does not appear to be in the interests of your client nor of this Department. Your request for such reopening is therefore denied.

Sincerely yours,

(S) OVETA CULP HOBBY
Secretary

David I. Shapiro, Esq.
Empire State Building
350 Fifth Avenue
New York 1, New York

Exhibit 12, Annexed to Amended Complaint

February 10, 1954

Mrs. Oveta Culp Hobby
Department of Health, Education and Welfare
Washington, D. C.

Re: Kendrick M. Cole

Dear Mrs. Hobby:

I am in receipt of your letter of February 4, denying a request for a reopening of the case of Kendrick M. Cole. It would appear that a government employee who has rendered long and devoted public service should, in fairness, be given every opportunity to prove beyond suspicion that his continued employment is clearly consistent with the interests of national security. If a position other than this is taken, then the Security Program, which is designed to protect the interests of national security, merely becomes a means of removing employees whose views are not orthodox. Surely this was not the intention of the Security Program or of President Eisenhower in issuing Executive Order 10450.

Your letter of February 4, indicates that a reopening of Mr. Cole's case does not appear to be in Mr. Cole's interest. I can only advise that Mr: Cole, knowing full well the penalties for perjury, will state under oath,

(a) that he did not knowingly establish or maintain any close association with any member of the Communist Party;

(b) that he did not maintain a sympathetic association with the Nature Friends of America, except in connection with his hobby, hiking and camping, and in this connection he only used a cabin operated by this organization as a guest of an individual

in possession of a key to this cabin. Moreover, he specifically refused to become a member of said organization;

(c) that he donated no work to the Nature Friends of America, except to mark or blaze trials in the woods in connection with his hobby of hiking and camping;

(d) that he donated no funds to the Nature Friends of America except the sum of approximately $1.50 to $2.00 for the use of firewood in connection with his use of a cabin owned by said organization;

(e) that he attended no social gatherings of this organization other than three, one of which was a dance, the other two being beer parties, and that he attended same as a guest of a member of said organization.

I respectfully submit for your consideration the following additional factors:

(1) the charges contained in the letter of November 25, 1953 were insufficient on their face and not in compliance with Section 14 of the Veteran's Preference Act (5 U. S. C., Sec. 863) or the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1 et seq.);

(2) that Executive Order 10450, as it applies to the Department of Health, Education and Welfare, is unconstitutional, and in violation of the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1 et seq.);

(3) that the Act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-3) is unconstitutional insofar as it purports to grant an unlawful exercise of the legislature power to the executive.

Exhibit 12, Annexed to Amended Complaint

Given the opportunity, we will show that Mr. Cole's continued employment with the government is something that should be desired by the Department of Health, Education and Welfare, inasmuch as it would seem to be the desire of the Department to retain in employment all loyal and efficient employees. Moreover, we will prove that Mr. Cole's retention in employment is clearly consistent with the interests of the national security.

I humbly submit that these factors, together with the invalidity of the procedure used concerning Mr. Cole's suspension of November 25, 1953, lends itself to your consideration and I humbly submit that in the interests of fairness and justice that Mr. Cole be given an opportunity to clear his name.

Very truly yours,

DAVID I. SHAPIRO.

DIS:DS

CC:

MR. HAROLD B. SIEGEL
Assistant to the General Counsel
Department of Health, Education and Welfare
Washington 25, D. C.

Exhibit 13, Annexed to Amended Complaint

Department of

HEALTH, EDUCATION AND WELFARE

Washington

Zone 25

Feb 24 1954

Dear Mr. Shapiro:

I have your letter of February 10, 1954, which appears to be a request for a reconsideration of the denial of the request for reopening the case of Kendrick M. Cole, whose separation was directed pursuant to the provisions of Executive Order 10450 and the Security Regulations of this Department.

The substantive information contained in your letter of February 10 was considered at the time of the determination. The separation of Mr. Cole was accomplished, as indicated above, in accordance with Executive Order 10450 and the security regulations of this Department. The validity and constitutionality of that Executive Order and the constitutionality of the Act of August 26, 1950 (64 Stat. 476) upon which the order is in part based, are not matters to be determined by this Department.

Accordingly there is no basis to disturb the conclusions set out in my letter of February 4, 1954.

Sincerely yours,

OVETA CULP HOBBY
Secretary.

Mr. David I. Shapiro
350 Fifth Avenue
New York 1, New York

Exhibit 14, Annexed to Amended Complaint

In your reply refer to
File. R2:RBu:ett
and date of this letter

UNITED STATES CIVIL SERVICE COMMISSION

SECOND UNITED STATES CIVIL SERVICE REGION

Comprising the States of New York and New Jersey

Office of the Director, New York 14, N. Y.

March 3, 1954

Dickstein and Shapiro
Empire State Building
350 Fifth Avenue
New York 1, New York

Dear Sirs:

We are referring to your letter of February 25, 1954, transmitting the appeal of Kendrick M. Cole under the provisions of Section 14 of the Veterans' Preference Act and the Commission's regulations established thereunder, from the adverse decisions of the Department of Health, Education and Welfare. The supporting documents you submitted show that Mr. Cole was adversely affected by decisions made by the agency in accordance with the provisions of Executive Order 10450.

This Executive Order provides that the provisions of Public Law 733, 81st Congress, the Act of August 26, 1950, shall apply to all other departments and agencies of the government as well as those specified in the Public Law. In effect, adverse actions made under Executive Order 10450 are made under the authority of Public Law 733.

The Commission has held that the provisions of Section 14 of the Veterans' Preference Act of 1944 are not applicable to suspensions or terminations of preference civilian officers or employees by the various departments and agencies concerned under authority of Public Law 733. Accordingly, there is no right of appeal by a preference eligible to the Commission under Section 14 from an adverse action initiated under Executive Order 10450. We must respectfully decline therefore to accept Mr. Cole's appeal.

Ye may request reconsideration of this decision and submit evidence and representations in support of your request. In lieu thereof, you may appeal further to the Commissioners, U. S. Civil Service Commission, Washington 25, D. C. In either case, appeal must be made within seven (7) days after the date you receive this letter.

Sincerely yours,

JAMES E. ROSSELL
James E. Rossell
Regional Director

Exhibit 15, Annexed to Amended Complaint

Address Only
"Civil Service Commission"
In Your Reply Refer to
File BAR:McB:rlb
and Date of This Letter

UNITED STATES CIVIL SERVICE COMMISSION
Washington 25, D. C.

May 5, 1954

Messrs. Dickstein and Shapiro
Attorneys at Law
350 Fifth Avenue
New York 1, New York

Dear Sirs:

This is in reply to your appeal from the decision of the Director, Second U. S. Civil Service Region, that the case of Kendrick M. Cole is not within the purview of Section 14 of the Veterans' Preference Act of 1944.

The decision of the Regional Director as stated in the letter addressed to you on March 3, 1954, has been reviewed in conjunction with the representations you have submitted in Mr. Cole's behalf. Your attention is invited to Section 1 of Executive Order 10450, which reads: "In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government," and to the first proviso of the Act of August 26, 1950 (Public Law 733, 81st Congress) which reads: "That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be

notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final."

In view of these provisions, and of the circumstances of Mr. Cole's case, this office can take no other action but to affirm the decision previously communicated to you by the Regional Office.

For the Commissioners:

Received May 6, 1954

Sincerely yours,

JOHN E. BLANN
John E. Blann, Chairman
Board of Appeals and Review

Answer

(Filed August 30, 1954)

Defendants answer the allegations of the complaint as follows:

First Defense

1. Defendants deny the allegations of paragraph First of the complaint.

2. Defendants deny the allegations of pargraph Second of the complaint.

3. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Third of the complaint.

4. Defendants admit the allegations of paragraph Fourth of the complaint.

5. Defendants admit the allegations of paragraph Fifth of the complaint.

6. Defendants admit the allegations in paragraph Sixth of the complaint.

7. Defendants admit that during said investigation plaintiff was asked questions concerning his attitude, associations and friends, but deny that during said investigation or at any other time plaintiff was asked questions concerning his politics or the politics of any other individual.

Defendants further deny the authenticity of Exhibit 1, attached to the complaint, not only as to its contents, but as it purports to be a transcript of plaintiff's interview by

Messrs. Barry and Cole. Defendants allege that no transcript of said interview was taken and that the aforementioned Exhibit 1 represents merely plaintiff's recollection of the said interview.

Except as herein admitted, the defendants deny each and every allegation contained in paragraph Seventh of the complaint.

8. Defendants admit the allegations contained in paragraph Eighth of the complaint.

9. Defendants admit the allegations contained in paragraph Ninth of the complaint.

10. Defendants admit the allegations of paragraph Tenth of the complaint.

11. Defendants admit the allegations of paragraph Eleventh of the complaint.

12. Defendants admit the allegations of paragraph Twelfth of the complaint, including the allegation that the letter of January 15, 1954, Exhibit 6, attached to the complaint, did not inform plaintiff of a right to appeal to the United States Civil Service Commission, but defendants deny plaintiff was entitled to such an appeal in an Executive Order 10450 proceeding and further deny any allegation which implies such a right.

13. Defendants admit the allegations of paragraph Thirteenth of the complaint.

14. Defendants admit the allegations of paragraph Fourteenth of the complaint.

15. Defendants admit the allegations of paragraph Fifteenth of the complaint, including the allegation that the

letter of February 4, 1954, Exhibit 11, attached to the complaint, did not advise plaintiff of a right of appeal to the United States Civil Service Commission, but defendants deny plaintiff was entitled to such an appeal in an Executive Order 10450 proceeding and further deny any allegation which implies such a right.

16. Defendants admit that on or about February 10, 1954, plaintiff wrote a letter to defendant Hobby, a copy of which is attached to the complaint as Exhibit 12, but defendants deny each and every other allegation contained in paragraph Sixteenth of the complaint.

17. Defendants admit the allegations of paragraph Seventeenth of the complaint, including the allegation that the letter of February 24, 1954 from defendant Hobby, plaintiff's Exhibit 13, attached to the complaint, did not advise plaintiff of a right to appeal to the United States Civil Service Commission, but defendants deny plaintiff was entitled to such an appeal in an Executive Order 10450 proceeding and further deny any allegation which implies such a right.

18. Defendants admit the allegations of paragraph Eighteenth of the complaint.

19. Defendants admit the allegations of paragraph Nineteenth of the complaint.

20. Defendants admit the allegations of paragraph Twentieth of the complaint.

21. Defendants admit the allegations of paragraph Twenty-first of the complaint.

22. Defendants admit the allegations of paragraph Twenty-second of the complaint.

Answer

23. Defendants deny the allegations of paragraph Twenty-third of the complaint, except defendants admit that the plaintiff, in his position as a Food and Drug Inspector with the Food and Drug Administration, Department of Health, Education and Welfare, New York District, New York, New York, had no access to any secrets of the Government of the United States, or "classified" material, and was not in a position to influence policy against the interests of the Government of the United States.

24. Defendants deny the allegations of paragraph Twenty-fourth of the complaint.

25. Defendants deny the allegations of paragraph Twenty-fifth of the complaint.

26. Defendants deny the allegations of paragraph Twenty-sixth of the complaint.

27. Defendants deny the allegations of paragraph Twenty-seventh of the complaint.

28. Defendants admit the allegations of paragraph Twenty-eighth of the complaint.

29. Defendants deny the allegations of paragraph Twenty-ninth of the complaint.

30. Defendants admit that there are not now any administrative procedures available to the plaintiff, but the defendants deny that the plaintiff timely exhausted all remedies previously available to him under the applicable administrative procedures in that plaintiff was advised by letter dated November 25, 1953, annexed to the complaint as Exhibit 3, of his right to a hearing if requested within thirty days from the receipt of said letter, however, no request for a hearing was made by the plaintiff until January 27, 1954, Exhibit 7, attached to the complaint, which

was over two months after the aforementioned letter of November 25, 1953, and twelve days after notification to the plaintiff of his termination and seven days subsequent to the effective date of said termination.

Except as herein admitted, the defendants deny each and every allegation contained in paragraph Thirtieth of the complaint.

31. Defendants deny the allegations of paragraph Thirty-first of the complaint.

32. Defendants allege that they were without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Thirty-second of the complaint.

SECOND DEFENSE

The complaint does not present a justiciable controversy over which the Court has jurisdiction.

THIRD DEFENSE

The Court is without jurisdiction of the subject matter of this action in that plaintiff seeks to subject to judicial review executive action which is committed by law to the sole and exclusive discretion of the executive.

FOURTH DEFENSE

The Court is without jurisdiction in that the action of the defendants complained of in this action were in compliance with the applicable statutes and were neither arbitrary, capricious, or an abuse of discretion.

FIFTH DEFENSE

Plaintiff's removal was in all respects in compliance with the Constitution, applicable statutes, and in the national interest.

SIXTH DEFENSE

Plaintiff's failure to avail himself of the opportunity to obtain an administrative hearing precludes this Court from granting relief.

SEVENTH DEFENSE

The complaint fails to state a cause of action against defendant Young, Chairman of the United States Civil Service Commission, in view of plaintiff's failure to join as party defendants, Commissioners Lawton and Moore, both of whom are indispensable to this action.

EIGHTH DEFENSE

The Court has no jurisdiction to entertain the petition because it is in effect a suit against the United States to which it has not consented.

NINTH DEFENSE

The complaint fails to state a claim against defendants upon which relief can be granted.

WHEREFORE, defendants pray that the complaint be dismissed in all respects with costs to the defendants.

WARREN E. BURGER
Assistant Attorney General
LEO A. ROVER
United States Attorney
EDWARD H. HICKEY
Attorney, Department of Justice
DONALD B. MACGUINEAS
Attorney, Department of Justice
ANDREW P. VANCE
Attorney, Department of Justice
Attorneys for Defendants

* * *

Plaintiff's Motion for Judgment on the Pleadings

(Filed September 10, 1954.)

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, plaintiff moves the Court to enter judgment on the pleadings in favor of plaintiff herein on the ground that plaintiff is entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

As grounds for the motion, plaintiff states that it appears clearly from the complaint and answer that plaintiff was dismissed from government employment on the basis of a finding that his retention in employment was not clearly consistent with the interests of national security, which was made in violation of Section 14 of the Veterans Preference Act (5 United States Code, Section 863) and Public Law 733 (5 United States Code, Section 22-1, *et seq.*).

Plaintiff's memorandum of points and authorities in support of the instant motion is attached hereto captioned as "Plaintiff's Memorandum of Law."

Respectfully submitted,

JAMES H. HELLER,
DAVID I. SHAPIRO,
Attorneys for Plaintiff.

Defendants' Cross-Motion for Judgment on the Pleadings

(Filed October 8, 1954)

Pursuant to Rule 12c of the Federal Rules of Civil Procedure, defendants move the Court to enter judgment on the pleadings in favor of the defendants herein on the ground that defendants are entitled to judgment as a matter of law on the undisputed facts appearing in the pleadings.

As grounds for the motion, defendants state that it is apparent from the complaint and answer that plaintiff was dismissed from government employment on the basis of a finding that his retention in employment was not clearly consistent with the interest of national security; plaintiff failed to avail himself of the opportunity to obtain an administrative hearing; and the actions of the defendants complained of in this action were in compliance with the applicable statute.

In support of this motion, the Court is respectfully referred to the pleadings and exhibits on file and the attached memorandum of points and authorities in opposition to plaintiff's motion for judgment on the pleadings and in support of defendants' motion for judgment on the pleadings.

WARREN E. BURGER
Assistant Attorney General

LEO A. ROVER
United States Attorney

EDWARD H. HICKEY
DONALD B. MACGUINEAS

ANDREW P. VANCE
Attorneys, Department of Justice

Attorneys for Defendants

Opinion

(Filed October 26, 1954)

James H. Heller, Esq., of Washington, D. C., and David I. Shapiro, of New York, N. Y., for the plaintiff.

Donald B. MacGuineas, Attorney, Department of Justice, of Washington, D. C., for the defendants.

The plaintiff in this action challenges the legality of the procedure for the removal of Government employees in the interest of national security.

The plaintiff was a Food and Drug Inspector, employed by the Food and Drug Administration of the Department of Health, Education and Welfare. Pursuant to the applicable statute and Executive Order, which are hereafter referred to in greater detail, after an interview in which he was interrogated at length, he was served with charges to the effect that he established and continued a close association with individuals reliably reported to be Communists, and maintained a continued and sympathetic association with an organization which was included in the Attorney General's list of subversive groups. He was accorded an opportunity to submit an answer, but declined to do so. The proceedings concluded with a termination of his services by the head of the Department, on the ground that his continued employment was not clearly consistent with the interests of national security.

The plaintiff brings this action to secure reinstatement to his position, claiming that the Executive Order, pursuant to which he was removed, was invalid and that the procedure followed in severing his connection with the Government was not in accordance with law. The pertinent facts are not in dispute and are set forth in the pleadings.

Both sides moved for judgment on the pleadings, and the case came on for a hearing on these cross-motions.

The basic statute, under which the plaintiff was removed from office, is the Act of August 26, 1950 (64 Stat. 476; 5 U. S. C. A. 22-1). Its pertinent portions read as follows:

> "*Notwithstanding the provisions of section 652* of this title, *or the provisions of any other law*, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, *in his absolute discretion and when deemed necessary in the interest of national security*, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services; * * * " (Emphasis supplied.)

The statute prescribes the procedure to be followed in notifying the employee of the reasons for his suspension and giving him an opportunity to submit statements and affidavits in opposition within 30 days after such notification. It further provides for a hearing, then for a review of the case by the agency head or some official designated by him, and finally for a written statement of the decision

of the agency head, whose determination was to be final. The statute concludes (5 U. S. C. A. 22-3) as follows:

> "The provisions of sections 22-1 to 22-3 of this title shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. * * * "

To summarize succinctly the pertinent provisions of the Act, it empowers the heads of the specified Government departments and agencies in their absolute discretion and when deemed necessary in the interests of national security, to suspend any officer or employee of that department or agency, and then, after completion of the specified procedure, to remove him from office. The President is authorized to extend the statute to such other departments and agencies as he may deem necessary in the best interests of national security.

Acting pursuant to this authority, the President on April 27, 1953, issued Executive Order No. 10450, which extended the provisions of the Act "to all other departments and agencies of the Government". This direction is preceded by a recital that the President deemed such action necessary in the best interests of national security. An examination of this Executive Order and its comparison with the statute, inescapably lead to the conclusion that the Order is within the orbit of the Act of Congress. The statute authorized the President to extend it to such other departments and agencies as he might from time to time deem necessary in the best interests of national security. On the basis of a finding that he deemed such action necessary in the best interests of national security, he extended the provisions of the Act to all other departments and agencies of the Government, that is to all departments and agen-

cies of the executive branch of the Government in addition to those enumerated in the Act. This he had the power to do under the very terms of the statute.

It must be recalled that Article II, Section 1, of the Constitution provides that "the executive Power shall be vested in a President of the United States of America". Section 3 of Article II, provides that, "he shall take Care that the Laws be faithfully executed". Under the authority vested in him by these two provisions, the President is empowered to remove in his own discretion any officer or employee of the Executive branch of the Government whom he or any of his predecessors has appointed.[1] The head of an executive department or agency may pursue a similar course as to the employees appointed by him or his predecessors, except to the extent that this power is limited by an Act of Congress. In the early years of the Republic it was not customary to remove Government officers or employees, but it was assumed that they would continue in their positions indefinitely. In fact, history records that President Thomas Jefferson in reply to an importunity for an appointment to office, replied that there were no vacancies because "few die and none resign". With the advent of President Andrew Jackson, the policy of the Government radically changed. From that time on, it was customary for an incoming administration to make numerous changes in the personnel of Government departments and agencies purely for political reasons and for purposes of patronage. Holding political views contrary to those of the administration in power was considered sufficient ground for removal from office. As the complexities of Government increased, the realization gradually grew that the development of a

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[1] *Myers* v. *United States*, 272 U. S. 52. An exception has been developed in respect to members of administrative commissions on the ground that they are quasi-administrative and quasi-judicial, *Humphrey's Executor* v. *United States*, 295 U. S. 602.

career service was necessary both from the point of view of efficiency and from the standpoint of justice to individual employees. The result was the enactment of the Civil Service Act, which provided that no one within a group of employees known as the Classified Civil Service, should be subject to removal except on charges, or in case of a reduction in force (5 U. S. C. A. 652). Later the Veterans' Preference Act was passed. It barred the removal of any Government officer or employee who was a war veteran, except under certain specified conditions (5 U. S. C. A. 851, 861, 863). As the two World Wars created several million veterans, the result has been that the vast majority of Government employees have at least a partial security of tenure and are protected from dismissal except under certain specified conditions, either by virtue of the Civil Service Act or the Veterans' Preference Act, or both. It must be emphasized, however, that except as otherwise provided by Act of Congress, every Government employee is subject to removal from office at the will of the Executive.

The Act of August 26, 1950 (5 U. S. C. A. 22-1) is in effect a limitation on the Civil Service Act and the Veterans' Preference Act, and withdraws the protection of these two statutes or any other Act of Congress from any officer or employee whose removal is deemed necessary in the interests of national security. This conclusion is rendered clear beyond peradventure of a doubt by the emphatic introductory clause reading: "Notwithstanding the provisions of section 652 of this title [i.e., the Civil Service Act] or the provisions of any other law [i.e., the Veterans' Preference Act], * * *" Consequently under the Act of 1950, as extended by Executive Order to other Government departments and agencies, any officer or employee of the Executive branch of the Government is subject to removal in the absolute discretion of the head of his department or agency, when deemed necessary in the interests of

national security. The rights of the officer or employee in question are safeguarded by requiring the head of the agency to follow a specified procedure before the removal becomes final.

We may now proceed to a consideration of the specific objections raised by the plaintiff to the legality of the action of which he complains. First, it is urged that the Act of August 26, 1950, should be construed as being limited to those employees who are "security risks" and as not applicable to employees charged with disloyalty, as was true of the plaintiff. There is manifestly no basis for this contention in the plain, unambiguous wording of the statute. The Act does not refer either to employees who are disloyal, or to employees who are security risks. It authorizes the removal of any employee "when deemed necessary in the best interests of the national security". Obviously, this comprehensive phraseology is broad enough to cover both disloyal employees and employees who are security risks. The statute makes no distinction between the two.

Plaintiff's counsel seek to support their argument by recourse to the Committee reports concerning this legislation (S. Rept. No. 2158 and H. Rept. No. 2330, 81st Cong. 2d Sess., U. S. Code Congressional Service, 1950, Vol. 2, pp. 3278 *et seq.*). It is, of course, the duty of the courts in construing and applying a statute to endeavor to ascertain the intent of the legislative body. If the phraseology of the Act is obscure or ambiguous, the Committee reports are the primary source to which recourse should be had in order to determine the intent of the Congress. If the language of the statute is clear, however, such resort is not necessary. Even if, however, the Committee reports are consulted in this instance, it will be found that they do not sustain the plaintiff's contention. On the contrary, they seem to support the Government's theory that the intent of the Congress was twofold: first, to supply legislative au-

thority for a prior Executive Order issued by the President creating a procedure for the removal of disloyal employees; and second, to extend the power of the President in order to cover employees who are security risks, though not disloyal. Both classes of employees are mentioned in the Committee reports. The Reports state that it is intended that the President's loyalty program should be continued and that the bill was concerned further with the problem of dealing with those Federal employees, who, although loyal, are so careless as to jeopardize the national security.

The construction of the Act urged by the plaintiff would lead to an absurd result. Its effect would be to create legislative authority for the removal of employees who are security risks, but not employees who are disloyal. Manifestly, such an illogical outcome could not have been within the contemplation of the Congress. Counsel for the plaintiff seem to be laboring under the notion, which the court deems fallacious, that a disloyal employee constitutes a danger to internal security only if he holds what is denominated as a sensitive position, namely, a position in which he has access to secret information or secret documents. This is far too limited a view of the potential danger from disloyal employees. For example, conceivably it is within the realm of possible contemplation that an employee connected with public water works is in a position in time of emergency to do something that may harm the water supply of the community. Likewise, the actions of a disloyal Food and Drug Inspector may impair the public health. Examples might be multiplied *ad infinitum.* In fact the Committee Reports unequivocally state that "Disloyal persons should not be permitted to be employed in the Federal service under any circumstances. They are not entitled to Federal employment of any kind."

It is further argued that the Executive Order of the President is beyond the scope of the statute because instead of enumerating by name the specific agencies that are deemed sensitive, the Order extends the provisions of the Act of 1950 to all Government departments and agencies without referring to them by title. Obviously, if the Executive Order listed every Government agency separately, this objection would have no foundation. Surely, the action of the President in blanketing all Government departments and agencies under the Act in so many words, instead of listing each of them, one by one, does not contravene the power conferred upon him. It must be noted in this connection that the Executive Order contains an express finding that "the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; * * * "

Again it is further contended in behalf of the plaintiff that the Executive Order transgresses the Veterans' Preference Act, in that it does not provide for the procedure prescribed in that statute. Obviously, however, the Act of 1950, which was enacted subsequently to the Veterans' Preference Act, supersedes the latter *pro tanto* insofar as the two are inconsistent. The Act of 1950 created an exception from the Veterans' Preference Act for the employees covered by the latter, as has already been explained.

It is finally objected in behalf of the plaintiff that the procedure prescribed in *Mulligan* v. *Andrews*, 211 F. (2d) 28, was not followed. That case, however, was decided under the Veterans' Preference Act and, therefore, is not applicable here.

The court concludes that Executive Order 10450 is valid and that the removal of the plaintiff from office is not subject to attack.

Order

The plaintiff's motion for judgment on the pleadings is denied. The motion of the defendants for judgment on the pleadings is granted.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

October 26, 1954.

Order

(Filed November 12, 1954)

This cause having come before the Court on plaintiff's and defendants' cross motions for judgment on the pleadings, and it appearing that, in accordance with the opinion of the court rendered in this case on October 26, 1954, that the complaint as amended fails to state a claim upon which any relief can be granted;

IT IS HEREBY ORDERED that plaintiff's motion for judgment on the pleadings be and it hereby is denied; defendants' motion for judgment on the pleadings be and it hereby is granted; and the complaint as amended be and hereby is dismissed.

ALEXANDER HOLTZOFF,
District Judge.

Dated: November 12, 1954.

Notice of Appeal

(Filed January 5, 1955)

Notice is hereby given that Kendrick M. Cole, plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered herein on November 12, 1954, denying plaintiff's motion for judgment on the pleadings, granting the defendants' motion for judgment on the pleadings, and dismissing the amended complaint.

JAMES H. HELLER
James H. Heller
Attorney for Plaintiff-Appellant,
Kendrick M. Cole
1026 Woodward Building
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UNITED STATES COURT OF APPEALS

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12526

KENDRICK M. COLE, Appellant,

v.

PHILIP YOUNG, Chairman, United States Civil Service Commission, et al., Appellees

Appeal from the United States District Court for the District of Columbia

OPINION—Decided July 28, 1955

Mr. David I. Shapiro, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom Mr. James H. Heller was on the brief, for appellant. Mrs. Helen M. Rosenthal also entered an appearance for appellant.

Mr. Donald B. MacGuineas, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of Court, with whom Mr. Samuel D. Slade, Attorney, Department of Justice, was on the brief, for appellees. Mr. John D. Lane, Assistant United States Attorney, also entered an appearance for appellees.

Before Edgerton, Prettyman and Bastian, Circuit Judges

PRETTYMAN, Circuit Judge:

Appellant Cole was a five-point veterans' preference eligible employed in the classified Civil Service as a food and drug inspector in the Department of Health, Education and Welfare. After an investigation pursuant to Executive Order 10450[1] he received a written statement of charges, which were, generally speaking, that he had continued in close association with individuals reliably reported to be Communists and had donated to and attended

[1] 3 C. F. R. 72 (Supp. 1953).

meetings of an organization designated by the Attorney General under Section 12 of the Executive Order. He replied to this letter, declining to make any explanation of the charges, saying that the request of the Government was an invasion of his private rights and of his right of freedom of association. His letter was forwarded to the Secretary, who ordered that his employment be terminated. Some two weeks later Cole, by his counsel, wrote the Secretary, asking a reopening of the case and stating that if it were reopened he would prove that he had not knowingly had the associations or relations which were alleged. The Secretary denied the reopening and later denied a second request for a reopening. Cole appealed to the Civil Service Commission under Section 14 of the Veterans' Preference Act,[2] but the Director would not accept the appeal. The Commission approved the Director's decision, holding that Act not applicable to dismissals under Public Law 733.[3] Thereupon Cole filed a civil action in the District Court, praying for a declaratory judgment and for an order restoring him to his position. The District Court, with an exhaustive opinion,[4] granted the defendants' motion for judgment on the pleadings, dismissing the complaint for failure to state a claim upon which relief could be granted.

Upon his appeal to this court Cole makes three principal points, and the Government makes one additional point, which it raised in its motion for judgment on the pleadings. It says Cole failed to exhaust his administrative remedy and so his action in court must fail. While Cole failed to pursue the administrative remedy offered him—he affirmatively rejected it—nevertheless the administrative process was exhausted and a final administrative decision was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken.

Cole's first point is that the President could not extend the summary dismissal provisions of Public Law 733 to employees holding non-sensitive, non-policy making posi-

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[2] 58 Stat. 390 (1944), as amended, 5 U. S. C. A. § 863.

[3] 64 Stat. 476 (1950), 5 U. S. C. A. § 22—1 *et seq.*

[4] Cole v. Young, 125 F. Supp. 284 (1954).

tions in a Department such as Health, Education and Welfare. He makes an extensive argument based upon the congressional debates and several writings in the field, plus a rationalization of the purposes of such a statute. The trouble with the argument is that the statute itself is explicit on the point. It provides:

> "Sec. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security."[5]

The statute puts the selection of the agencies to be affected in the hands of the President. It says nothing about sensitiveness or policy-making. The basic provision of the statute (Section 1) applies in terms to "any civilian officer or employee" in the named departments and agencies. When the President, under Section 3, *supra*, makes the statute applicable to other departments, he makes the "any civilian" provision applicable.

The foregoing is entirely constitutional. The Constitution vests all executive power in one person, the President. It provides:[6] "The executive Power shall be vested in a President of the United States." His is a lone, personal responsibility in so far as carrying out the laws which Congress has enacted is concerned. The business of the Congress is to make laws. The business of the President is to carry them out. Authority is ordinarily a concomitant of responsibility. But we need not here venture into the intricacies of executive-legislative relationship in respect to executive employees. It is enough to say that, when the Congress recites that the President may dismiss summarily executive employees whenever he deems dismissal necessary or advisable in the interest of the national security, the enactment is valid. The policies to be pursued in the matter by the Congress and by the President are for them to determine, not for us.

Cole's second point is that Public Law 733 at most authorizes summary dismissal when such termination of

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[5] 64 Stat. 477 (1950), 5 U. S. C. A. § 22—3.

[6] Art. II, § 1, cl. 1.

employment is "necessary or advisable in the interest of the national security", while Executive Order 10450 requires agency heads to insure that the retention of any employee "is clearly consistent with the interests of the national security." He says the latter quoted clause is not within the former and, therefore, the Order is not within the statute. But we think the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute; and this is quite apart from the consideration that the President may have such power (to dismiss executive employees whose retention he deems not clearly consistent with the national security) as a part of the direct constitutional grant of "executive power". There is a line somewhere beyond which Congress cannot go in enacting prescriptions in respect to executive power over executive employees. It might be, for example, that if Congress required the hiring of executive personnel whose employment the President deemed not consistent with the national security, the enactment would be void. Congress has the power to make the laws and so can make laws concerning Government employ; but the President has the power, and so the responsibility, of carrying out all the laws, and Congress cannot impinge upon that power. There is a boundary between the two powers. We do not have that problem in our view of the case. We advert to it because of the view expressed by our dissenting judge. If we were of his view and thought the President's Order inconsistent with the act of the Congress, we would have to decide the constitutional question thus presented.

Cole seems to argue that, since the statute places the discretion in the "agency head", the President had no power to issue an Order upon the subject. In the first place, this is an executive matter and, if Congress had meant to prohibit the President from acting in respect to it, a serious question as to the validity of its act would arise. As we have already said, the Constitution vests

the executive power in the President. In the second place, Congress knew, or must be conclusively presumed to have known, that subordinate officers in the executive branch of the Government act under the direction of the President, and it must have had that fact in mind when it conferred discretion upon these agency heads in this statute. Such an understanding is implicit in the enactment. In the third place, Cole's argument in its ultimate essence is that the action of the agency head in the case at bar was void; thus the argument amounts to a contention that action by a subordinate is void if, having authority to act, he follows a policy and program laid down by a superior. That position is untenable on its face. The President surely has the right to lay down the lines within which his subordinates shall exercise discretions confided in them, and their operation within such lines is valid, not void. Perhaps if a subordinate refused to follow the Presidential declaration or directive under such circumstances, other problems might be presented, but we have none such here.

Cole's third point is that his notice of dismissal was not the required "written statement of the decision of the agency head". Public Law 733 provides that an employee proposed for suspension "shall be notified of the reasons for his suspension". Cole does not, and could not, complain about the sufficiency of the statement given him at this point. Then the statute provides that an employee proposed for dismissal shall receive five things, the first of which is a statement of the charges against him and the last a written statement of the decision of the agency head. Cole does not claim he did not get a written statement of the charges against him or that the statement given him was inadequate. His claim is that the letter of the Secretary which advised him his employment had been ordered terminated, "based on the study of all the documents in your case, including your reply to reference letter", was not a compliance with the statute as above quoted.

We are all familiar with the difference between "opinions" and "decisions" in judicial matters. "Opinions" state the reasons, and "decisions" merely state the actions taken. The statute here used a well-known word, and we give it its well-known meaning.

Cole claims the applicability of *Mulligan* v. *Andrews*,[7] but the statute there involved required a statement of the "reasons" for removal. The statute now before us does not so provide in respect to the final step in a termination of employment.

The judgment of the District Court dismissing the complaint is

Affirmed.

EDGERTON, *Circuit Judge, dissenting:* As we held a year ago, enforcing the Lloyd-LaFollette Act's requirement that "No person in the classified civil service of the United States shall be removed" without notice and reasons in writing: "The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear." *Roth* v. *Brownell*, — U.S. App. D.C. —, —, 215 F. 2d 500, 502. It does not follow, of course, that Congress could impose absurd and crippling limits. But this is irrelevant here.

In the Lloyd-LaFollette Act and the Veterans' Preference Act, Congress limited the President's control over removals. No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations. 64 Stat. 476, 5 U.S.C. §§ 22-1, 22-3. The question is whether this case is within the exceptions. I think it is not, for three reasons.

1. The exceptions do not cover the Food and Drug Administration, in which the appellant was employed.

The Act of 1950 provides in § 1: "Notwithstanding the provisions of section 652 of this title [Lloyd-LaFollette Act], or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee. . . ." Sec-

[7] 93 U. S. App. D. C. 375, 211 F. 2d 28 (D. C. Cir. 1954).

tion 1 also provides that a suspended employee may be dismissed if the agency head thinks it "necessary or advisable in the interest of the national security". Section 3 provides that the Act "shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security."

In Executive Order No. 10450 the President, ostensibly "deeming such action necessary in the best interests of the national security", undertook to extend the Act to "all other departments and agencies of the Government". I think this blanket extension unauthorized and invalid. Congress had specified some agencies that have something to do with national security. Committee reports describe them as "sensitive" or "concerned with vital matters" affecting national security. H. R. Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950); S. Rep. No. 2158, 81st Cong., 2d Sess. 2 (1950); S. Rep. No. 2264, 80th Cong., 2d Sess. 2 (1948). Evidently Congress thought some other agencies might likewise be concerned with national security. Accordingly Congress authorized the President to extend the Act. There is, I think, not the slightest reason for supposing that Congress intended to authorize the blanketing in of all agencies. A committee report said: "the bill makes ample provision for the employment in nonsensitive agencies of certain of those employees who may be classified in sensitive departments and agencies as security risks." H. R. Rep. No. 2330, 81st Cong., 2d Sess. 4 (1950). Accordingly Section 1 of the Act provides "That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government . . . ." Since many agencies, including the Food and Drug Administration in the Department of Health, Education and Welfare, in which the appellant was employed, have nothing to do with national security, the Act of 1950 has nothing to do with them. The authorization to bring "other" departments and agencies within the Act should be recognized, in accordance with the purpose and intent of Congress, as limited to those that might reasonably be deemed "necessary in the best interests of national security." It could not reasonably be deemed necessary in

the best interests of national security that employees in all agencies, including not only the Food and Drug Administration but the Fish and Wildlife Service, be subject to summary unappealable dismissal.

The Supreme Court has said regarding the "plain meaning" of an Act of Congress: "When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543.

2. The Act of 1950 authorizes the head of an agency covered by the Act to dismiss suspended employees "whenever he shall determine such termination necessary or advisable in the interests of the national security". Appellant's agency head did not make that determination concerning the appellant, but determined only that appellant's continued employment "is not clearly consistent with the interests of national security". In Executive Order 10450 the President purported to adopt the "clearly consistent" test, but he had no authority to adopt it. It differs vitally from the "necessary or advisable" test that Congress prescribed.

The difference is closely parallel to that between the test, "reasonable grounds exist for belief that the person involved is disloyal", used in Executive Order 9835, and the test, "There is a reasonable doubt as to the loyalty of the person involved", used in the later Executive Order 10241. As this court has held, that "amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal,' does cause a reasonable doubt as to whether he is in fact loyal." *Jason* v. *Summerfield*, — U. S. App. D. C. —, —, 214 F. 2d 273, 276, *cert. denied*, 348 U.S. 840.[1] Just so here, the amended

[1] The court found the difference so essential that employees who had been cleared under the old standard might be reexamined and dismissed under the new one.

standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is "necessary or advisable in the interests of national security", does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-Lafollette Act and the Veterans' Preference Act.

3. The procedure used in appellant's dismissal does not even comply with the Act of 1950. Even that Act requires "a written statement of the decision of the agency head". Frequently, in legal connections, "decision" means not only a result but the reasons for the result.[2] The Administrative Procedure Act follows this usage. It requires that "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." Sec. 8(b); 60 Stat. 242, 5 U.S.C. § 1007(b). The letter telling appellant he was dismissed, but not telling him why, was evidently not "a written statement of the decision" as Congress uses that term in connection with administrative procedure. The required statement is plainly intended to be a safeguard against arbitrary action. Unless reasons are given no safeguard is provided. *Cf. Mulligan* v. *Andrews*, 93 U.S. App. D. C. 375, 211 F. 2d 28.

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[2] One of the definitions of "decision" in Webster is "an account or report of a conclusion, especially of a legal adjudication or judicial determination of a question or cause; as, a *decision* of the Supreme Court." One of the definitions in the Century is ". . . final judgment or opinion in a case which has been under deliberation or discussion; as, the *decision* of the Supreme Court."

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1955

No. 12,526

KENDRICK M. COLE, Appellant,

v.

PHILIP YOUNG, Chairman, United States Civil Service Commission, et al., Appellees

Appeal from the United States District Court for the District of Columbia

Before Edgerton, Prettyman and Bastian, Circuit Judges

JUDGMENT—July 28, 1955

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: July 28, 1955.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Edgerton.

Designation of Record (omitted in printing).

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, Petitioner,

vs.

PHILIP YOUNG, et al.

ORDER OF SUBSTITUTION—November 21, 1955

On Consideration of the motion of counsel for petitioner to substitute Marion B. Folsom, present Secretary of Health, Education, and Welfare, as a party respondent in this case in the place and stead of Oveta Culp Hobby, resigned,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, Petitioner,

vs.

PHILIP YOUNG, et al.

ORDER ALLOWING CERTIORARI—Filed November 21, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.